STATE OF MICHIGAN

COURT OF APPEALS

CLARE GUNNETT, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED January 18, 2007
v	No. 263838 Kalamazoo Circuit Court
HOLLY BROOKS, Defendant-Appellant/Cross-Appellee.	LC No. 04-000015-CK

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered in favor of plaintiff following a bench trial. Defendant argues that the trial court erred in finding that no partnership existed between plaintiff and defendant. Plaintiff cross-appeals the judgment, arguing that the trial court erred in failing to award attorney fees to plaintiff. We affirm.

I. Facts

In 1963, plaintiff Clare Gunnett and his wife, Shirley, formed a very successful Amway[1] distributorship (hereinafter "IB-287"). Plaintiff and his wife had four children, none of whom had an ownership interest in IB-287. Plaintiff's wife passed away in 1983, at which time he became the sole owner of IB-287. In 1978, plaintiff's daughter, defendant Holly Brooks, purchased an existing Amway distributorship (hereinafter "IB-4054"). IB-4054 was in plaintiff's line of sponsorship, which meant that plaintiff's sales bonuses were based, in part, on the volume of sales that IB-4054 achieved.

Amway assigned point values to each product and awarded sales bonuses based on the number of points each distributorship earned. Amway also awarded bonuses based on the number of "qualified" distributorships, or independent businesses ("IBs") that an IB had in its

[1] Trial testimony indicated that Amway Corporation changed its name to Quixtar in 1999 or 2000. For ease of reference, we will refer to the corporation as "Amway" throughout this opinion.

line of sponsorship. An IB was qualified when it earned 7,500 points per month. Beginning in 1979, plaintiff began transferring points to IB-4054 so that defendant could maintain her status as a qualified distributorship. Defendant compensated plaintiff for the transfers by paying him an amount equal to the sales bonus she received as a result of the transfers. Both IB-4054 and IB-287 benefited from the transfers. Both companies earned more money. Further, by qualifying defendant's business, plaintiff earned bonuses, vacations, gifts, and was able to participate in profit sharing.

In November 1998, plaintiff and defendant signed a document purporting to form what Amway referred to as an "umbrella partnership." Although Amway discouraged the formation of formal partnerships, it permitted distributorships that personally sponsor each other to form a partnership "jointly under an umbrella, by adding the proposed partner's name to each IB." According to Amway, "the resulting umbrella partnership is still considered as two distinct independent businesses, for purposes of all bonus and award calculations." Plaintiff signed the agreement because defendant told him that it was like a will and that it would provide for the equal distribution of his business among his children upon his death. According to plaintiff, when plaintiff and defendant signed the agreement, they did not discuss forming a partnership or changing the operation of IB-287 or IB-4054.

After Amway received a copy of the umbrella distributorship agreement, it added defendant's name to IB-287 and added plaintiff's name to IB-4054. The monthly bonus checks from both businesses were made payable to plaintiff and defendant. However, they agreed that plaintiff would keep the money from IB-287 and defendant would keep the money from IB-4054, and the parties acted in conformance with this agreement from 1983 until the time of the trial. The parties never accessed each other's bank accounts. After the parties signed the agreement, there were no changes in the operation of IB-287 or IB-4054. Defendant did not try to operate IB-287, she did not receive any checks from IB-287, and plaintiff did not receive any checks from IB-4054. Plaintiff continued to transfer points to IB-4054 until June 2000, at which time Amway implemented a new program, making it virtually impossible for plaintiff to transfer points to any IBs in his line of sponsorship.

In October 2002, plaintiff attempted to remove defendant's name from IB-287. He learned that defendant, who was the executrix of his mother-in-law's estate, kept "the whole thing all to herself" and he feared that, upon his death, defendant would take his business and "run" with the money. An Amway representative advised plaintiff that defendant had an ownership interest in IB-287 and, therefore, he could not remove her name from IB-287 unless he obtained her signature on a business name change form or obtained a court order. Defendant refused to sign a business name change form. In February 2004, plaintiff initiated this action against defendant, requesting the trial court to enter a declaratory judgment (1) declaring that he was the sole owner of IB-287; (2) ordering defendant to execute the documents necessary to remove her name from IB-287; and (3) ordering defendant to pay plaintiff's costs, interest, and actual attorney fees. Defendant argued that a partnership existed between plaintiff and defendant and that plaintiff was not entitled to relief because he failed to request a dissolution of the partnership.

After a bench trial, the trial court held that plaintiff was the sole owner of IB-287 and that no partnership existed between plaintiff and defendant. The court found that neither party's actions demonstrated any intent to form a partnership. Instead, the evidence accepted as true by

the trial court established that, when the parties entered into the umbrella distributorship agreement, they were merely attempting to plan for the distribution of IB-287 upon plaintiff's death. Thus, the trial court ordered defendant to execute all documents necessary to remove her name from IB-287. The trial court denied plaintiff's request for attorney fees, finding that "neither party [was] without fault in conducting the affairs that led to this dispute."

II. Analysis

A. Did a Partnership Exist?

Defendant contends that the trial court erred in finding that no partnership existed between plaintiff and defendant. Further, defendant argues that the court erred in failing to apply Michigan partnership law when determining the existence of the partnership.

The determination of whether a partnership exists is a question of fact. *Miller v City Bank & Trust Co*, 82 Mich App 120, 123; 266 NW2d 687 (1978). Following a bench trial, we review de novo a trial court's conclusions of law and review a trial court's findings of fact for clear error. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; 588 NW2d 467 (1998) (citations omitted). In reviewing the trial court's findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *Id.*

The Michigan Uniform Partnership Act ("UPA"), MCL 449.1 *et seq.*, defines a partnership as an association of two or more persons to carry on as co-owners a business for profit. MCL 449.6(1). In this case, defendant alleged the existence of a partnership and, therefore, the burden of proof to establish a partnership was on defendant. *Lobato v Paulino*, 304 Mich 668, 670-671; 8 NW2d 873 (1943). "Stricter proof is required to establish a partnership between members of the same family." *Id.* at 674. In considering whether a partnership exists, the intention of the parties is of prime importance. *Id.* at 675. See also *Barnes v Barnes*, 355 Mich 458, 461; 94 NW2d 829 (1959). In reviewing the evidence presented at trial, we conclude the trial court's factual findings were not clearly erroneous. The evidence presented at trial supported the trial court's finding that neither plaintiff nor defendant intended to form a partnership when they signed the umbrella distribution agreement. Plaintiff signed the agreement because he believed that would provide for the distribution of his business to his children upon his death. Defendant testified at trial that, when she drafted and signed the agreement, she did not expect to receive any monetary gain. Her only intent was to receive IB-287 when plaintiff passed away. She did not intend to operate IB-4054 any differently and did not expect plaintiff to operate IB-287 any differently.

However, whether plaintiff and defendant intended to form a partnership was not solely determinative of whether a partnership actually existed. "Pursuant to MCL 449.6(1), in ascertaining the existence of a partnership, the proper focus is on whether the parties intended to, and in fact did, 'carry on as co-owners a business for profit' and not on whether the parties subjectively intended to form a partnership." *Byker v Mannes*, 465 Mich 637, 653; 641 NW2d 210 (2002). It is unimportant whether the parties would have labeled themselves "partners." *Id.*

at 638-639. Partners need not be aware of their status as "partners" in order to have a legal partnership. *Id.* at 646.

"The gist of the partnership relation is mutual agency and joint liability." *Lobato, supra* at 675. Important indicia of a partnership include the filing of a certificate of partnership, common authority in the administration and control of the business, a common interest in the capital employed, and a sharing in the profits and losses of the business. See MCL 449.101; *Barnes, supra* at 462. The undisputed evidence in this case establishes that no certificate of partnership was filed, as required by MCL 449.101, and no written partnership agreement existed. Further, neither plaintiff nor defendant ever filed a partnership income tax return for IB-287. Nothing in this case indicates that defendant contributed capital to IB-287, and such a contribution is an essential element of a partnership. See *Employment Security Comm v Crane,* 334 Mich 411, 416; 54 NW2d 616 (1952).

The evidence presented at trial established that defendant was not involved in the administration and control of IB-287. After the parties executed the umbrella partnership agreement, there were no changes in the operation of IB-287 or IB-4054. Further, during trial, defendant repeatedly referred to IB-287 as her "dad's business." Amway considered defendant a co-owner of IB-287. However, whether Amway classified plaintiff and defendant's relationship as a "partnership" is not dispositive of whether a partnership existed under the UPA. See MCL 449.6(1); *Byker, supra* at 653. Moreover, it is well established that joint ownership does not of itself establish a partnership, whether the co-owners do or do not share profits. MCL 449.7(2); *Lobato, supra* at 676.

Furthermore, the evidence presented at trial in this case supports the conclusion that plaintiff and defendant did not share IB-287's profits. From 1983 until the time of trial, plaintiff received all of the payments that Amway made to IB-287 and defendant received all of the payments that Amway made to IB-4054. Defendant did not receive any of IB-287's profits. Contrary to defendant's argument, the system of transferring points between the businesses was not sufficient to create a partnership. First, the points were transferred from one business, IB-287, to another business, IB-4054. Thus, the arrangement did not amount to the operation of "*a* business for profit," as required by MCL 449.6(1) (emphasis added). Second, at the time plaintiff transferred the points to IB-4054, the points were assets of IB-287, but they were not "profits." Thus, the transfers did not amount to the sharing of IB-287's profits.

In sum, there are certain indicia of a partnership significantly lacking in this case. This lack of evidence that the parties carried on the business as co-owners for profit is fatal to defendant's claim of partnership. *Byker, supra* at 653; *First Public Corp v Parfet,* 246 Mich App 182; 631 NW2d 785 (2001), vacated in part on other grounds 468 Mich 101 (2003). Accordingly, we affirm the trial court's decision. *Hess v Cannon Twp,* 265 Mich App 582, 596; 696 NW2d 742 (2005).

B. Vexatious Appeal/Sanctions

Plaintiff contends that defendant's partnership claim was frivolous and, therefore, the trial court erred in failing to award attorney fees to plaintiff. Plaintiff further requests that this Court sanction defendant for filing a vexatious appeal.

A trial court's decision regarding whether an action is frivolous is reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). MCR 2.114 "requires an attorney or party to sign pleadings, motions, and other papers filed with the court and provides for sanctions when attorneys or parties sign frivolous pleadings." *In re Attorney Fees & Costs*, 233 Mich App 694, 706; 593 NW2d 589 (1999). The sanctions may include an order to pay the other parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. MCR 2.114(E); MCL 600.2591. An action is frivolous if one of the following conditions is met:

> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3)(a).]

Nothing in the record indicates that defendant's primary purpose in asserting her partnership claim was to harass, embarrass, or injure plaintiff. Further, nothing in the record indicates that defendant did not have a reasonable basis to believe that the facts underlying her legal position were in fact true. Finally, although defendant did not prevail on her partnership claim, her legal position was not devoid of arguable legal merit. The mere fact that defendant did not prevail did not render her partnership claim frivolous. See *Kitchen, supra* at 654; *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991). While defendant's claim was not successful, she presented a sufficient argument grounded in law and fact to avoid a finding of frivolity.

Further, we deny plaintiff's request for attorney fees under MCR 7.216(C)(1).[2] The claim was not frivolous and there was a reasonable basis for belief that there was a meritorious issue to be determined on appeal. Thus, plaintiff is not entitled to sanctions. See *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36-37; 666 NW2d 310 (2003). Further, nothing in defendant's brief leads us conclude that her brief was "grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the court." MCR 7.216(C)(1)(b).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

---

[2] Pursuant to MCR 7.216(C)(1), plaintiff's request should have been made by motion under MCR 7.211(C)(8), as we are not inclined to determine on our own initiative that the appeal is vexatious.